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In The
Supreme Court of the United States

CHARLES DEMORE, DISTRICT DIRECTOR, SAN FRANCISCO DISTRICT OF IMMIGRATION AND NATURALIZATION SERVICE, ET AL.,

Petitioners,

v.

HYUNG JOON KIM,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMICI CURIAE CITIZENS AND IMMIGRANTS FOR EQUAL JUSTICE, CAMBODIAN ASSOCIATION OF AMERICA, HMONG NATIONAL DEVELOPMENT, INC., NATIONAL COALITION FOR HAITIAN RIGHTS, NATIONAL COUNCIL OF LA RAZA, ORGANIZATION OF CHINESE AMERICANS, THE SIKH COALITION, AMERICAN IMMIGRATION LAWYERS ASSOCIATION, FLORENCE IMMIGRANT AND REFUGEE RIGHTS PROJECT, FLORIDA IMMIGRANT ADVOCACY CENTER, AND NATIONAL IMMIGRATION LAW CENTER, SUPPORTING RESPONDENT

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INTEREST OF *AMICI CURIAE*[1]

Amici are the families affected by the mandatory detention provisions of 8 U.S.C. § 1226(c) (2000), lawyers with experience representing those in detention, and organizations that serve communities affected by mandatory detention policies. Our stories and those of thousands of others similarly situated demonstrate the harshness of § 1226(c) and lay bare the fiction that mandatory detention under § 1226(c) is simply a brief way station on an inevitable path to deportation. A small sampling of these stories is presented throughout this brief.[2]

Citizens and Immigrants for Equal Justice (CIEJ) is a national coalition of over 1,000 families in twenty-nine states whose integrity has been directly threatened by mandatory detention. Our members are the family members of lawful permanent residents who face deportation. Mandatory detention does incalculable injury to our families, separating parents from children and depriving our family members of essential income and emotional support. In many cases, mandatory detention leads our family members to give up hope and agree to permanent exile even though they have valid claims to remain with us in the United States.

The Cambodian Association of America (CAA) provides advocacy, cultural education, and support services to Cambodians in Long Beach, California, the largest

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[1] This brief is submitted by consent of the parties. It was authored in whole by *amici curiae*. No person or entity other than *amici*, their members, or their counsel, contributed to the costs of preparation and submission of this brief.

[2] *Amici* have lodged documents with the Court substantiating the stories presented in this brief that are not described in reported cases or media accounts. *See* Lodging of *Amici Curiae* CIEJ *et al.* (hereinafter "Lodging").

population of Cambodians in the U.S. Mandatory detention has resulted in members of our community losing access to the basic due process all Americans enjoy. Many Cambodians in Immigration and Naturalization Service (INS) detention signed their orders of removal in order to be released from mandatory detention without fully understanding the implications of that decision.

Hmong National Development, Inc. (HND) is a national nonpartisan, nonprofit organization dedicated to furthering the education of all Hmong, to increasing economic prosperity for the community, and to developing resources that strengthen the role and involvement of Hmong individuals and organizations in shaping the community's future. Hmong facing removal are refugees who escaped persecution and are often devastated at the prospect of returning to the country they fled. Mandatory detention needlessly tears apart Hmong families during these trying proceedings.

The National Coalition for Haitian Rights (NCHR) advocates on behalf of the Haitian community to protect the rights of Haitian immigrants and asylum seekers in the U.S. Among our many concerns are redressing the punitive nature of INS detention policies and the need for full appreciation of human rights conditions in Haiti. Mandatory detention penalizes members of our community who raise valid claims regarding the persecution they would face if deported to Haiti.

The National Council of La Raza (NCLR) is the largest constituency-based national Hispanic civil rights organization in the U.S. NCLR is a nonprofit, nonpartisan umbrella organization for more than 300 local affiliated community-based organizations and has a broader network of 33,000 groups and individuals nationwide. Approximately 40% of the country's 35 million Latinos are foreign-born, and since many Latinos live in mixed-status

families, the vast majority of our nation's Latinos – citizens and noncitizens – are directly affected by immigration policy.

The Organization of Chinese Americans, Inc. (OCA) is a nonprofit, nonpartisan civil rights organization dedicated to ensuring the equality of Chinese Americans, Asian Americans, and all Americans in the U.S. Founded in 1973, OCA currently represents over 10,000 members in fifty chapters and twenty-six college affiliates. OCA has worked to ensure that Asian American immigrants are treated fairly and are accorded the rights guaranteed to them under the Constitution and federal, state and local law.

The Sikh Coalition is a national civil rights organization that works to safeguard the civil and human rights of all citizens and communicate the collective interests of Sikhs to civil society. Many Sikhs in the U.S. are lawful permanent residents who would be subject to mandatory detention during the pendency of removal proceedings. The Sikh Coalition is concerned that these lawful permanent residents would be subjected to detention even though they pose no flight or other risk.

American Immigration Lawyers Association (AILA) is a national association with over 7,000 members throughout the U.S., including lawyers and law school professors who practice and teach in the field of immigration and nationality law. AILA seeks to advance the jurisprudence of immigration law, to facilitate the administration of justice, and to elevate standards of practice among those appearing in a representative capacity in immigration and naturalization matters.

The Florence Immigrant and Refugee Rights Project (Florence Project) is a nonprofit organization that provides free legal assistance to the roughly 1,900 immigrant men, women, and children who are detained by INS on any given day in Arizona. Many of the individuals that

the Florence Project counsels are longtime lawful permanent residents who have extensive family and community ties in the U.S. In the Project's experience, detention is a severe deterrent for individuals when making the decision whether to pursue claims for relief.

The Florida Immigrant Advocacy Center (FIAC) is a nonprofit legal aid organization dedicated to promoting the basic human rights of immigrants. FIAC's attorneys have represented hundreds of lawful permanent residents affected by the mandatory detention provisions of § 1226(c), and have witnessed the devastating impact these provisions have on our nation's longtime immigrants, their U.S. citizen family members, and our communities.

The National Immigration Law Center (NILC) is a nonprofit legal center dedicated to protecting and promoting the rights of low-income immigrants and their family members. NILC conducts trainings, produces legal publications, provides technical assistance to legal assistance organizations, and conducts litigation to promote the rights of low-income immigrants. A major concern of the organization is to ensure the fairness and constitutionality of immigration law enforcement.

SUMMARY OF ARGUMENT

Our loved ones, clients and community members detained under § 1226(c) are lawful permanent residents and often have been for most of their lives. Many of the people most affected by the absence of those detained are U.S. citizens.[3] Mandatory detention results in a loss of

[3] Seventy-five percent of children in immigrant families are U.S. citizens. Patrick J. McDonnell, *Report Finds Mixed-Status Citizenship in Many Families*, L.A. Times, June 28, 1999, at B1.

liberty that is total and severe, often as great as or greater than the punishment imposed for past criminal convictions. The full weight of mandatory detention is brought to bear by a mere preliminary assessment of deportability even though many of those detained ultimately establish that they are not removable as charged or win relief from removal. Detention under § 1226(c) impairs the ability of countless others who may have similarly meritorious claims to obtain counsel and present their cases. Those who concede deportability are prevented from tying up their affairs and making preparations with their families for their departure, to the detriment of the wider community.

Amici know from experience that detention throughout the complex process of determining removability is not the minimal and determinate imposition on liberty that the government claims it to be. Nor are existing mechanisms adequate to prevent the prolonged detention of people who do not in fact present a risk of flight or a danger to their communities. In cases where federal court intervention or other factors have allowed individualized findings to be made, many of those subject to § 1226(c) have shown that they merit release. *Amici* seek a ruling from this Court that each individual be accorded the same opportunity.

ARGUMENT

I. Mandatory detention impinges on the fundamental liberty interests of those detained and their families, imposing burdens on people who do not pose a flight risk or danger and pressuring those detained to abandon meritorious claims to relief

Mandatory detention disrupts every facet of a person's life. Most lawful permanent residents subjected to § 1226(c) have lives firmly established in the U.S. Time

spent in detention tears them away from their families, prevents them from working, running businesses, and attending school, and subjects them to onerous prison conditions. Although immigration charges are civil, those detained suffer a total loss of liberty.

- **Elanith Valansi** endured nearly a year of mandatory detention under § 1226(c) before the Third Circuit Court of Appeals held that a single conviction for embezzlement was not a deportable offense. The day after she was taken into INS custody, her father, age fifty-six, died of a heart attack. She was only permitted to attend the funeral in handcuffs while guarded by seven INS agents wearing bulletproof vests, was kept in a separate room from her father's casket, and was prohibited from participating in the ritual throwing of dirt on the coffin. Family and friends were forbidden from coming within fifty feet of her to offer condolences, and the rabbi was prevented from approaching her to say a prayer. Ms. Valansi, born in Israel, arrived in the U.S. in 1974 when she was six weeks old and became a lawful permanent resident in 1990. Her parents, siblings and step-siblings are U.S. citizens or lawful permanent residents.[4]

Mandatory detention imposes this deprivation of liberty on people who have already shown that they are not dangerous. Many people held under § 1226(c) were never incarcerated[5] or served only short sentences. For example, Ansar Mahmood pled guilty to harboring an alien as a result of helping his sister's friends rent an apartment. He was sentenced to no jail time. However, as

[4] *Valansi v. Reno*, 278 F.3d 203, 205, 217 (3d Cir. 2002); Lodging at L-1.

[5] The Board of Immigration Appeals (BIA) has specifically noted that "release" under § 1226(c) can include release from a physical restraint other than a term of imprisonment, such as an arrest. *See In re West*, 22 I. & N. Dec. 1405, 1407-08, 1410 (BIA 2000).

of July, he had been held in INS mandatory detention for seven months. *See* Steve Orr, *Local Lock-Up Plays Global Role*, Rochester Democrat and Chronicle, July 21, 2002, at 6A.[6] Others have been released after criminal trial and permitted to surrender themselves to serve their sentences, or have otherwise proven themselves not to be flight risks. At his third hearing before an immigration judge, Dhonovan Serrano was informed that he should have been taken into mandatory detention upon release from criminal incarceration. The judge gave him three days to make arrangements, and Mr. Serrano complied, surrendering himself to INS. Prior to his surrender, he had driven from his home in Arizona to Dallas, Texas three times to attend removal hearings. *Serrano v. Estrada*, 201 F. Supp. 2d 714, 716 (N.D. Tex. 2002).[7]

Individuals and families suffer acutely from the separation imposed by mandatory detention. Many are taken into INS custody months or years after serving their sentences, resulting in massive disruption to their and

[6] *See also* Lynn Waddell, *Court of No Return*, Miami Daily Business Review, Apr. 1, 2002, at A6 (detainee served ten days in jail for shoplifting two flashlight batteries and spent at least three months in mandatory detention); Jody A. Benjamin, *'96 Reform Law Lets INS Cast a Wide Net*, Sun-Sentinel, Apr. 22, 2001, at 1A (Peterson Polidor served seventy-six days for theft and burglary but subsequently spent at least nine months in mandatory detention); Dave Harmon, *After a Brush with the Law, Some Legal Immigrants Face Deportation*, Austin American-Statesman, Jan. 16, 2000, at A1 (Jason Fransella was sentenced to three years probation in 1999 but spent at least four months in mandatory detention).

[7] *See also* Lodging at L-1 (after posting bail, Elanith Valansi was permitted to remain at liberty throughout her criminal proceedings and to surrender herself to serve her sentence); *id.* at L-2 (Jose Martinez remained at liberty on bail during his criminal case and once sentenced, was permitted to surrender himself into custody).

their family members' lives.[8] Further, INS can move detained individuals hundreds or thousands of miles away from their homes.

- Even though **Hawa Said** was pregnant, INS, after taking her into mandatory detention, transferred her to a detention center in San Diego, 2,427 miles away from her home, her family, and her attorney. INS moved her back to Alaska only after being ordered to do so by a federal judge. Throughout her removal proceedings, Ms. Said asserted that she was a U.S. citizen, a claim subsequently recognized by the State Department. Despite this assertion, she spent six months in § 1226(c) detention for a drug conviction for which she had served thirty days. She gave birth just over a month after the conclusion of her proceedings. Ms. Said, born in Yemen, came to the U.S. in 1978, when she was one year old. Her father and two children are U.S. citizens.[9]

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[8] Susan Gilmore, *Mother Won't be Deported After All: '92 Conviction Had Left Her in Limbo*, Seattle Times, Aug. 7, 2002, at A1 (resident of Washington, a single mother of four citizen children, had been sentenced to probation in 1992 and was subsequently held in mandatory detention in Louisiana for seven months. She was ultimately granted relief under former 8 U.S.C. § 1182(c)); Benjamin, *supra* (Donovan Williams held in mandatory detention for at least sixteen months for a 1986 conviction for which he served eight months. His long-term girlfriend had to work extra nursing shifts while taking care of their four U.S. citizen children).

[9] *Birth Announcements*, Anchorage Daily News, Dec. 24, 1999, at 4C; Lisa Demer, *INS Ends Woman's Jail Ordeal*, Anchorage Daily News, Nov. 24, 1999, at 1A; Anthony Lewis, *Is this America?*, N.Y. Times, Sept. 21, 1999, at A29; *see also* Brett Barrouquere, *Seeking a "Second Chance": 32-year U.S. Resident Fights His Deportation*, Advocate (Baton Rouge), Aug. 13, 2001, at 1B (describing case of Robert Anthony Levy, sent by INS in February 1999 from Chicago to Pointe Coupee Parish jail in Louisiana, where he has seen his U.S. citizen wife and three U.S. citizen children only twice in the past two years because of the distance from Chicago); *Man Fights to Stay in U.S. After a Drug Conviction: Man Wants to Avoid Deportation Back to Iran*, Roanoke

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The combined weight of long separation from family, loss of income, and the prospect of extended confinement exerts enormous pressures on those mandatorily detained to forego or abandon meritorious defenses to removal. In 1999 and 2000, *amicus* the Florence Project identified twenty-four cases of detained clients who could contest their removability pursuant to a conviction for driving under the influence (DUI) under Arizona or California law. The controlling legal issue was on appeal from the Board of Immigration Appeals (BIA) to the Ninth Circuit and other circuit courts around the country. Faced with the prospect of mandatory detention during the pendency of their appeals, only fourteen of the eligible clients felt able to press their claims before the BIA. Of these, five abandoned their appeals before the BIA gave decisions in their cases. Seven more gave up before the circuit court ruled. Only two clients remained in detention to benefit from the Ninth Circuit's decision in *United States v. Trinidad-Aquino*, 259 F.3d 1140 (9th Cir. 2001) holding that their DUI convictions were not aggravated felonies for immigration purposes. Ultimately, the BIA acceded to the mounting consensus among the courts of appeals, reversing its prior precedent on DUI convictions. *In re Ramos*, 23 I. & N. Dec. 336 (BIA 2002). But this was all too late for the lawful permanent residents unable to bear continued detention.[10]

Times & World News, Aug. 5, 2001, at B1 (reporting on Majid Khoshghad, a resident of Virginia transported to an INS detention facility in Oakdale, Louisiana in 1999. A district court judge later ordered him transferred to a local jail in Virginia so that he could better challenge his underlying conviction); Benjamin, *supra* (noting Donovan Williams' transfer from Florida's Krome Detention Center to Clay County Jail, 320 miles and a six hour drive from his home).

[10] *See also* Lodging at L-3 (affidavit of law school clinical professor who has had many clients abandon meritorious claims rather than face protracted detention).

II. The liberty interests of lawful permanent residents are not diminished by a charge of removability

The government insists that persons subject to mandatory detention under § 1226(c) have committed crimes that "terminate their entitlement to remain in the United States," Pet. Br. at 11, and therefore have no significant liberty interest in being free from detention. But whether a person will be stripped of lawful permanent resident status and removed is determined at the end of proceedings, not at the outset. 8 U.S.C. § 1101(a)(20) (2000); 8 C.F.R. § 1.1(p) (2002). As the experiences of our family and community members and clients make clear, it is frequently impossible to determine whether someone is removable without careful and thorough adjudication in removal proceedings or in the federal courts. Nonetheless, persons charged as removable under § 1226(c) remain locked up without any opportunity to show that they are not a danger or a flight risk.

A. Some people detained under § 1226(c) are found to be citizens

Some of those charged with removability by INS demonstrate in proceedings that they are U.S. citizens, and therefore not deportable. However, while proving their claims, these U.S. citizens can languish in mandatory detention for months or years.

- **Joe Van Eeten**, a decorated Vietnam veteran, asserted throughout his proceedings that he had been naturalized in a ceremony at Camp Pendleton, California in 1968, just before being sent to Vietnam. The immigration judge eventually affirmed his claim, and the BIA rejected the government's appeal. Mr. Van Eeten spent nearly five months in § 1226(c) detention before a district court judge ordered that he be provided with a bond hearing. Had the court not struck down § 1226(c), Mr. Van Eeten would have been detained while he pursued his case before the immigration judge and defended against the government's appeal. Born a citizen of the Netherlands, he came to the U.S. as a lawful permanent resident in 1961 and joined the Marines in 1967.[11]

For persons not born in the U.S., proving U.S. citizenship is a legally and factually intensive process, requiring documentation of their own and their families' history over many years. As Mr. Van Eeten's case illustrates, questions can arise concerning the naturalization process itself. In addition, whether a person derived citizenship from the naturalization of a parent under 8 U.S.C. § 1431 or former § 1432 (repealed 2000) depends on issues such as what constitutes legal custody, *see Fierro v. Reno*, 217 F.3d 1, 4 (1st Cir. 2000), legal separation, *see Moussa v. INS*, 302 F.3d 823, 824 (8th Cir. 2002), or divorce, *see Said v. Eddy*, 87 F. Supp. 2d 937, 938 (D. Alaska 2000). Acquisition of citizenship at birth under 8 U.S.C. § 1401(g) may revolve around questions of legitimation, requiring the analysis of state laws or laws of other countries. *See, e.g., Wedderburn v. INS*, 215 F.3d 795, 799 (7th Cir. 2000) (noting possible effect of Jamaican law of child custody on citizenship claim); *Alexander v. INS*, No. Civ. 96-147-P-C, 1997 WL 97114, at *1-2 (D. Me. Feb. 27, 1997) (whether petitioner had become a citizen when his father naturalized determined by Maine legitimation law). None of these legal and factual questions can be resolved by looking at the charging document.

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[11] *See Van Eeton v. Beebe*, 49 F. Supp. 2d 1186 (D. Or. 1999); Lodging at L-4; Don Hamilton, *Immigration Judge Decides Against Deporting Ex-Marine*, Oregonian, Sept. 21, 1999, at E1.

B. Some people detained under § 1226(c) show that their convictions have been misclassified and that they are not deportable

It is often less than clear how a person's criminal convictions should be classified under immigration law. These classifications depend on complex and fact-sensitive interactions between immigration law, federal criminal statutes, and the criminal statutes of each of the fifty states. The result is that many lawful permanent residents are able to demonstrate during the course of their removal hearings that their crimes do not make them deportable.

- INS charged **Mario Solorzano-Patlan**, a lawful resident of thirteen years and father of a U.S. citizen child, as an aggravated felon based on a guilty plea to charges of entering an automobile with intent to commit theft.[12] He was ordered removed, and nine months later his appeal of the aggravated felony finding was dismissed by the BIA, which found that the burglary statute under which he was convicted "falls easily within" the definition of an aggravated felony at 8 U.S.C. § 1101(a)(43)(F) and (G). Seven months later, the Seventh Circuit found that it met neither definition, admonishing that "the INS . . . would be well advised to look at the charging papers in order to ensure that [basic elements of the relevant federal definition] are satisfied before it initiates the serious ramifications of removal proceedings based on an alleged 'burglary offense.'"[13]

[12] Mr. Solorzano-Patlan had been recommended to participate in an alternative incarceration program ("boot camp") but could not because INS had placed a detainer on him with the state authorities in anticipation of his detention under § 1226(c).

[13] *Solorzano-Patlan v. INS*, 207 F.3d 869, 875 (7th Cir. 2000).

Similarly, Elanith Valansi, whose case is discussed *supra* p. 6, was charged as an aggravated felon for an embezzling offense but ultimately found not removable by the Third Circuit, nearly a year after INS had detained her. Classification of given crimes as aggravated felonies is a particularly unsettled area of immigration law, requiring comparison of widely varying state statutes to federal definitions and often requiring an examination of analogy to federal criminal offenses.[14] The same uncertainty hangs over those charged as having been convicted of a "crime involving moral turpitude" (CIMT) under 8 U.S.C. § 1227(a)(2)(A)(ii), a term with no statutory definition. *See Jordan v. DeJorge*, 341 U.S. 223 (1951). The INS' initial determinations about whether a given crime meets either of these definitions are often overturned by immigration courts and the federal courts.[15]

[14] *See, e.g.*, 8 U.S.C. § 1101(a)(43)(B), (C), (D), (E), (F), (H), (I), (J), (K)(ii), (K)(iii), (L), (M)(ii), (N), (O), (P) (2000) (incorporating by reference various sections of federal criminal code or criminal offenses under Immigration and Nationality Act); 8 U.S.C. § 1101(a)(43)(A), (G), (K)(i), (M)(i), (Q), (R), (S), (T) (2000) (requiring comparison of state or federal crime to definition in statute).

[15] *See, e.g.*, *Chowdhury v. INS*, 249 F.3d 970 (9th Cir. 2001) (laundering conviction under 18 U.S.C. § 1956(a)(1)(B)(i) not an aggravated felony); *United States v. Rivera-Sanchez*, 247 F.3d 905 (9th Cir. 2001) (marijuana conviction under Cal. Health & Safety Code § 11360(a) not an aggravated felony); *Lopez-Elias v. Reno*, 209 F.3d 788 (5th Cir. 2000) (burglary of a vehicle conviction under Tex. Penal Code § 30.04(a) not an aggravated felony); *Vang v. Ashcroft*, 149 F. Supp. 2d 1027 (N.D. Ill. 2001) (operating a vehicle without an owner's consent not aggravated felony); *In re Santos-Lopez*, 23 I. & N. Dec. 419 (BIA 2002) (en banc) (two Class B misdemeanor marijuana possession convictions under Tex. Penal Code § 481.121 are not an aggravated felony); *In re Torres-Varela*, 23 I. & N. Dec. 78 (BIA 2001) (Arizona aggravated DUI under Ariz. Rev. Stat. § 28-692(A)(1) and § 28-697(A)(2), (D), (F), (H)(1), (I) and (J) not a crime involving moral turpitude); *see also United States v. Hernandez-Castellanos*, 287 F.3d 876 (9th Cir. 2002) (felony endangerment conviction under Ariz. Rev. Stat. § 13-1201 not an aggravated felony); *United States v.*

(Continued on following page)

C. Some people detained under § 1226(c) do not have "convictions" as defined in the Immigration and Nationality Act or are eligible for post-conviction relief in their criminal cases

Most grounds of deportability that trigger mandatory detention under § 1226(c) require that the respondent have been "convicted" of a "crime." *See* 8 U.S.C. § 1227(a)(2)(A)(i), (A)(ii), (A)(iii), (B), (C), (D) (2000). The Immigration and Nationality Act defines "conviction" as a formal judgment of guilt entered by a court, or a judicial or jury finding of guilt or admission of facts sufficient to warrant such a finding combined with some form of penalty or restraint. 8 U.S.C. § 1101(a)(48)(A) (2000). It is sometimes unclear at the outset of proceedings whether a given state criminal disposition meets this definition.

- **Miguel Devison-Charles** pled guilty to attempted possession of a controlled substance in the third degree in 1992, when he was nineteen years old. He was adjudicated a youthful offender under Article 720 of the New York Criminal Procedure Law and received a sentence of probation. In 1998, after missing an appointment with his probation officer, he was sentenced to one year of imprisonment. INS subsequently detained him and charged him as removable under 8 U.S.C. § 1227(a)(2)(B)(i), as an alien convicted of a controlled substance violation. Mr. Devison-Charles spent over eleven months detained in Oakdale, Louisiana before the BIA found that his resentencing on a youthful offender disposition did not fall within the definition of "conviction" at 8 U.S.C. § 1101(a)(48)(A).[16]

Chapa-Garza, 243 F.3d 921 (5th Cir. 2001) (felony DUI conviction under Tex. Penal Code § 49.09 not an aggravated felony); *United States v. Villanueva-Garcia*, 216 F.3d 1085 (9th Cir. 2000) (discharge of a firearm with gross negligence conviction under Cal. Penal Code § 246.3 not an aggravated felony); *United States v. Ponce-Casalez*, 212 F. Supp. 2d 42 (D.R.I. 2002) (simple assault not an aggravated felony).

In other cases, lawful permanent residents have grounds for relief based on post-conviction remedies. As this Court recently noted in *INS v. St. Cyr*, 533 U.S. 289, 322 (2001), the immigration consequences of a guilty plea are often central to an informed decision. Some states have statutes requiring criminal court judges to advise defendants that they may face removal if they are not citizens; the criminal court will sometimes vacate a plea entered in violation of these requirements.[17] When a conviction is vacated by a state court for legal error, it no longer remains a valid ground for removal. *See, e.g.*, *In re Rodriguez-Ruiz*, 22 I. & N. Dec. 1378 (BIA 2000).

- **Nishyar Abdullaciz Farok**, a refugee from northern Iraq, pled guilty to delivery of a controlled substance at the age of sixteen. After Mr. Farok was placed in removal proceedings, his lawyer presented prosecutors with evidence that Mr. Farok's conduct and his plea took place under threat of serious physical violence from two men who were ten years his senior. The prosecutors agreed to vacatur of the guilty plea on the ground that it was not voluntary and the charges were dismissed by the criminal court. Mr. Farok's removal case was subsequently dismissed.

[16] *In re Devison-Charles*, 22 I. & N. Dec. 1362 (BIA 2000); *see also Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000) (no conviction for purposes of immigration law where first possession or attempted possession offenses under Idaho and Arizona laws were expunged).

[17] *See* Cal. Penal Code § 1016.5; Conn. Gen. Stat. § 54-1j; Fla. R. Crim. P. 3.172(c)(8); Mass. Gen. Laws ch. 278, § 29D; Ohio Rev. Code § 2943.031; Or. Rev. Stat. § 135.385(2)(d); Tex. Crim. Proc. Code Ann. art. 26.13(a)(4); Wash. Rev. Code § 10.40.200.

Meanwhile, he endured seven months of mandatory detention.[18]

D. Some people detained under § 1226(c) qualify for cancellation of removal or relief under former § 1182(c)

Many of those who are detained under § 1226(c) qualify for cancellation of removal under 8 U.S.C. § 1229b(a), a form of relief granted to lawful residents who have been in that status for at least five years and who have resided continuously in the U.S. for at least seven years. From among the six criminal removal grounds triggering mandatory detention under § 1226(c), only one – aggravated felonies – categorically bars cancellation of removal. *See* 8 U.S.C. § 1229b(a)(3) (2000).

The government asserts that "a removable alien who is detained while the [immigration judge] consider[s] his application for discretionary relief is properly treated as removable unless and until a decision to award discretionary relief is made." Pet. Br. at 27. As noted *supra* p. 10, however, lawful permanent resident status does not terminate until and unless an administratively final order of removal has been entered. Given the breadth of the categories of offenses that can trigger removal proceedings, discretionary relief remains a vital safeguard against removal when, on balance, deporting the respondent would not be in the country's best interests. *St. Cyr*, 533 U.S. at 295 ("The extension of § [1182(c)] relief to the deportation context has had great practical importance, because deportable offenses have historically been defined broadly."); *In re Marin*, 16 I. & N. Dec. 581, 584 (BIA

[18] Lodging at L-5.

1978). Many of our clients and loved ones are forced to seek this relief while detained for long periods.

- **Joseph Okeke**, a Nigerian citizen who came to the U.S. as an infant, was convicted of a single offense of possession of less than one ounce of cocaine in 1999, at the age of nineteen, and served a six-month sentence. He was then transferred to INS custody and held under § 1226(c). An outstanding high school athlete who had acceptance letters from three colleges and no other criminal history, Mr. Okeke won cancellation of removal in December 1999, after six months of INS detention. INS waived any appeal of this determination, and he was released the next day. His attorney commented at the time that "[h]e just sat there for six months for no reason."[19]

Even individuals properly classified as convicted of an aggravated felony may qualify for relief from removal under former 8 U.S.C. § 1182(c) (repealed 1996) under this Court's ruling in *St. Cyr*. Contrary to the government's assertions, *see* Pet. Br. at 28, many of those currently detained pursuant to § 1226(c) may still avail themselves of the right to seek this form of relief because they came into INS custody well after the date of their conviction and any sentence of probation or imprisonment.

- In 1996 **Oscar Olguin-Ruiz** was convicted of a controlled substance violation after becoming

[19] *See Okeke v. Pasquarell*, 80 F. Supp. 2d 635 (W.D. Tex. 2000); Maro Robbins, *Requests for Bond Denied by Court*, San Antonio Express-News, Jan. 20, 2000, at 3B; Lodging at L-6; *see also, e.g.*, Lodging at L-7 (case of Kris Wiboontum, granted cancellation of removal nearly four months after the judge denied bond under § 1226(c)); *id.* at L-8 (case of Jose Luis Figueroa, granted cancellation after five months of mandatory detention); *id.* at L-10 (case of Juan Manuel Mireles Meza, granted cancellation four months after the judge denied bond pursuant to § 1226(c)).

addicted to painkillers following a back injury. He was sentenced to three years deferred adjudication and served no time. However, in August 2001, due to a misunderstanding with his probation officer, later resolved in his favor, he was taken into § 1226(c) detention. Under *St. Cyr*, he was eligible to apply for § 1182(c) relief, which he ultimately won. Nonetheless, he was mandatorily detained for more than nine months, without any opportunity to demonstrate that he presented neither a danger nor a flight risk. Mr. Olguin-Ruiz, born in Mexico, has been a lawful permanent resident since 1980. He has six U.S. citizen children and four U.S. citizen grandchildren.[20]

E. Some people detained under § 1226(c) qualify for relief from persecution

The government is dismissive of the fact that many people detained under § 1226(c) face persecution in their countries of origin, making them eligible for relief. *See* Pet. Br. at 29-30. There are three separate types of relief available: asylum under 8 U.S.C. § 1158, withholding of removal under 8 U.S.C. § 1231(b)(3), and, for those who face torture, relief under United Nations Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment, *see* 8 C.F.R. §§ 208.16-18 (2002). Many of our family and community members and clients have sought and won this relief while mandatorily detained under § 1226(c).

[20] Lodging at L-11; *see also Forbes v. Perryman*, No. 02 C 4254, 2002 WL 31236415, at *4 (N.D. Ill. Oct. 3, 2002) (noting petitioner's eligibility to apply for relief under § 1182(c) and denying INS' motion to dismiss petitioner's writ of habeas corpus); Lodging at L-12 (ordering petitioner's removal proceedings reopened to allow him to apply for a § 1182(c) waiver).

- **M.L.**, a client of *amicus* FIAC and citizen of Haiti, came to the U.S. as a lawful permanent resident in 1978 at the age of twenty-eight. She has five children, four of whom are U.S. citizens. Convicted of a cocaine charge and sentenced to six months in June 2000, she was released a month early for good behavior but was held and transferred to INS custody. Over seven months later an immigration judge granted Ms. L withholding of removal under § 1231(b)(3). The judge credited oral testimony, press accounts, and State Department reports of other females deported to Haiti from the U.S. who were immediately imprisoned and severely mistreated as what Haitians refer to as "imported criminals." INS did not appeal from the judge's decision, and Ms. L was subsequently released under an order of supervision. She is again living with her family, required to report once annually to INS. In total, Ms. L spent over 235 days detained.
- **Tou Ko Vue**, a Hmong born in Laos, spent nearly twenty months in detention vindicating his right to remain in the U.S. even though the government agreed from the beginning that he could not be removed to Laos. He immigrated to the U.S. as a refugee with his parents in 1979, when he was only five months old. His mother and older sister are lawful permanent residents, and he has ten younger U.S. citizen siblings. His father was shot and killed in 1995, when Mr. Vue was seventeen. In June 1999, INS placed Mr. Vue in removal proceedings and detained him, charging him as an aggravated felon based on a conviction for joyriding. Recognizing the situation of Hmong refugees, INS did not oppose an award of withholding of removal, and the judge granted withholding. Mr. Vue then appealed the judge's determination that he was an aggravated felon ineligible for asylum or cancellation of removal. He won this appeal and the case was remanded for consideration of these applications. On remand, INS did not oppose a grant of asylum, but because of the postponement of several hearings by the immigration

court, this relief was not granted until October 27, 2000.[21]

III. Detention impairs the liberty interest in being able to adequately defend against deportation

INS frequently charges persons as falling within § 1226(c) who could successfully refute these allegations or demonstrate eligibility for relief. As our loved ones, community members, and clients have found, however, mandatory detention severely impairs their ability to respond effectively to INS charges.

Mandatory detention directly impacts a person's ability to retain counsel. Approximately ninety percent of INS detainees go through proceedings without representation. Elizabeth Amon, *INS Fails to See the Light*, Nat'l L.J., Mar. 5, 2001, at A1. The detention facilities INS utilizes are not necessarily located in areas with lawyers willing and qualified to represent persons in detention. In addition to the eighteen INS run or contracted detention facilities, INS utilizes approximately 1,940 state prisons and county jails spread throughout the country to house over fifty percent of INS detainees.[22] Detention also prevents detainees from earning an income, creating further complications to retaining legal counsel. *See* 8 U.S.C. § 1229a(b)(4)(A) (2000) (respondents in removal proceedings have "the privilege of being represented, at no expense to the Government"). This translates into forced reliance on the scarce resources of the few public interest

[21] Lodging at L-13 (M.L.) *id.* at L-14 (Vue).

[22] *See* Julie Sullivan, *Illegal Immigrants are Dumped into a Secretive Prison Network Driven by Ineptness and Severe Immigration Reforms*, Sunday Oregonian, Dec. 10, 2000, at A1; *INS Detention Facilities*, *available at* www.ins.usdoj.gov/graphics/fieldoffices/detention/INSDetention.htm (last visited Oct. 22, 2002).

organizations and pro bono attorneys representing immigrants in detention for criminal offenses. But most detention facilities are not located near such organizations or attorneys, and those that do exist are minimal in comparison to the need. In addition, INS' practice of moving people from one facility to another, even in the midst of proceedings, can mean the loss of counsel for those able to retain a lawyer initially.

- **Max Ogando**, who is deaf, is only able to communicate in Spanish sign language. Despite the fact that he had free counsel and a Spanish sign language interpreter in New York, INS transferred Mr. Ogando to Etowah County Jail in Alabama. Because his lawyer was unable to travel the long distance to his hearing, Mr. Ogando was forced to appear in court without counsel. The immigration judge ordered him deported, a decision that has been appealed. When asked by a journalist about his case, the INS spokeswoman said, "We move people around to where we have the space." Mr. Ogando was taken into § 1226(c) detention after serving a one-year sentence for assault, a misdemeanor under New York law.[23]

Proving that one is not removable frequently involves complex legal analysis. For example, determining whether a crime is a removable offense involves comparing and contrasting state and federal statutes and parsing statutory provisions into their various subparts. In the case of Mr. Solorzano-Patlan, discussed *supra* p. 12, the Seventh Circuit analyzed his burglary conviction by comparing the particular provision in the Illinois statute to which he pled guilty with a generic definition of burglary, and criticized the immigration judge for only looking at the title of the state statute, rather than the particular characteristics of the statutory offense. *Solorzano-Patlan*, 207 F.3d at 872. Citizenship claims can involve examining state civil laws

[23] Sullivan, *supra*.

and the laws of foreign countries regarding legitimation procedures, legal separation, divorce, and custody. In Ms. Said's case, discussed *supra* p. 8, citizenship turned solely on whether her parents were divorced according to Yemeni law. Given this complexity, those without lawyers are acutely hampered in their ability to protect their status. The limited[24] legal resources available to detainees proceeding pro se cannot begin to compensate for the lack of access to counsel.

Applications for relief are also factually complex, requiring both extensive documentation and witnesses. Mandatory detention interferes with a person's ability to obtain either. Winning cancellation of removal or § 1182(c) relief depends heavily on one's ability to present sufficient positive equities, including family ties, length of time in the U.S., hardship should deportation occur, service in this country's Armed Forces, employment history, property or business ties, evidence of value and service to the community, proof of genuine rehabilitation, and other evidence attesting to one's good character, such as affidavits from family, friends, and community representatives. *In re C-V-T-*, 22 I. & N. Dec. 7, 11 (BIA 1998). Making this showing entails contacting a variety of administrative agencies, private employers, friends, and family members in order to obtain letters, records, affidavits, and other documents. In addition, applicants must sift through the papers, receipts, and records that have accumulated over many years. Respondents in removal proceedings have a right to present evidence on their behalf, 8 C.F.R. § 240.10(a)(4) (2002), but when they are detained, particularly if the

[24] INS standards permit facilities to limit detainees' access to legal materials to a mere five hours per week, and do not require facilities to provide state civil or criminal laws, civil laws of foreign countries, or reported decisions of federal district and appellate courts. *See* Immigration and Naturalization Service, Detention Operation Manual: Access to Legal Materials, at 3, Attachment A, Sept. 20, 2000.

facility is far from their family and community, applicants may be unable to exercise this right.

- **H.N.**, a California resident and citizen of Colombia, was detained by INS after serving time for a violation of probation on a drug possession offense and qualified to seek cancellation of removal. But he was soon transferred to a detention facility in rural Arizona, one hour's drive from an airport and inaccessible by public transportation. The immigration judge denied his cancellation application, finding that Mr. N had "not submitted any documentation to show his employment history but [merely] stated his employment history in his application along with the fact that he says he filed tax returns for a number of years in the United States." The judge also noted the absence of family members testifying on Mr. N's behalf. Because he was detained, Mr. N had been unable to obtain letters and other documentation of his work and tax history. Further, Mr. N's family could not afford plane tickets to attend the proceedings. He appealed to the BIA, which found that the immigration judge had erred and ordered a rehearing, and on remand the judge granted cancellation. Mr. N spent over eleven months in mandatory detention.[25]

IV. Mandatory detention under § 1226(c) is lengthy, and hearings assessing the applicability of § 1226(c) do not represent an adequate alternative to individualized bond determinations

A. Mandatory detention is neither brief nor determinate in duration because adjudication of claims to relief takes considerable time

The government argues that mandatory detention under § 1226(c) is not "indefinite" because it applies only during the pendency of removal proceedings. Pet. Br. at

[25] Lodging at L-15.

40. The government further argues that this detention is a minimal imposition because removal proceedings before immigration judges are completed in an average time of forty-seven days and a median time of thirty days. *See id.* at 39. Any period of detention under § 1226(c) is a total loss of liberty unjustified by a finding of the individual's danger to the community or flight risk. But the statistics are also misleading, presenting averages that are by no means typical of a case where a detained respondent seeks relief from deportation or contests removability. In such cases, proceedings before the immigration judge may stretch into the hundreds of days. *See, e.g.*, *Amaye v. Elwood*, 01-CV-2177, 2002 WL 1747540 (M.D. Pa. June 17, 2002) (proceedings before immigration judge lasted 276 days).[26] The cases discussed in Part II *supra* demonstrate that removal proceedings can be extremely complex and that vindication of meritorious claims necessarily takes time. Detention under § 1226(c) is neither as short nor as determinate in duration as the government alleges. *See* Pet. Br. at 39-40.

INS' policy of moving those detained under § 1226(c) often delays the beginning of removal proceedings. Even

[26] *See, e.g.*, *Chanthanounsy v. Cumberland County Sheriff*, 02-CV-71, 2002 WL 1477170 (D. Me. July 9, 2002) (proceedings before IJ concluded 140 days after respondent detained); *Serrano v. Estrada*, 201 F. Supp. 2d 714 (N.D. Tex. 2002) (109 days); *Peralta-Veras v. Ashcroft*, No. CV 02-1840, 2002 WL 1267998 (E.D.N.Y. Mar. 29, 2002) (123 days); *Yacoub v. Elwood*, No. 01-0809, 2002 U.S. Dist. LEXIS 12122 (E.D. Pa. Jan. 14, 2002) (118 days); *Baldio v. United States*, 172 F. Supp. 2d 1200 (D. Minn. 2001) (149 days); *Ng v. Demore*, No. C-01-20095, slip op. (N.D. Cal. Apr. 17, 2001) (296 days); *Belgrave v. Greene*, Civ. Action No. 00-B-1523, 2000 U.S. Dist. LEXIS 18648 (D. Colo. Dec. 5, 2000) (over 240 days); *Kahn v. Perryman*, No. 00 C 3398, 2000 WL 1053962 (N.D. Ill. July 31, 2000) (over 143 days); *Chukwuezi v. Reno*, Civ. A. No. 3: CV-99-2020, 2000 WL 1372883 (M.D. Pa. May 16, 2000) (140 days); *Tiv v. Reno*, No. 99 C 872, 2000 U.S. Dist. LEXIS 2170 (N.D. Ill. Feb. 23, 2000) (142 days); *Baltazar v. Fasano*, No. 99-CV-380, slip op. (S.D. Cal. Mar. 25, 1999) (114 days).

where a detainee is held in one place, proceedings before the immigration judge take considerable time. Where removal is contested, immigration proceedings have multiple stages: pleadings at which the respondent concedes to or challenges the factual allegations in the charging document, judicial findings on removability, submission of applications for relief, and adjudication of those claims. Most of the preliminary stages are conducted at separate "master calendar" hearings that can be days or months apart.

- **Hoang Minh Ly** came to the U.S. from Vietnam in 1986. With his brother, who is also a lawful permanent resident, he owns and operates two nail salons in Cleveland, Ohio. Placed in removal for two convictions for bank fraud for which he received sentences of four and eight months respectively, he was detained in Dayton, Ohio at the end of April 1999. His first two master calendar hearings were conducted in Cincinnati, fifty miles away. He was then transferred to North Royalton, Ohio and his case was moved to the immigration court in Cleveland for two further hearings; his fourth master calendar was held in his absence because the INS failed to transport him from the county jail where he was detained. In all, his proceedings before the immigration judge had gone on for seventeen months before a federal district court ordered a bond hearing. Mr. Ly's claim for relief under § 1182(c) under this Court's ruling in *St. Cyr* remains pending before the immigration court.[27]

Appeal by either party to the BIA extends mandatory detention for many additional months. *See Williams v. INS*, C.A. No. 01-043, 2001 WL 1136099, at *1 (D.R.I. Aug. 7, 2001) (appeal pending before the BIA for over twenty

[27] Lodging at L-16.

months).[28] In addition, mandatory detention continues simply on the basis of the government's notice of appeal to the BIA, even though INS may subsequently decline to prosecute.[29]

B. Hearings addressing the applicability of § 1226(c) are an inadequate mechanism to redress the statute's broad reach

The government contends that § 1226(c) contains adequate procedural safeguards because individuals detained under § 1226(c) can seek a hearing on whether

[28] The government asserts that BIA appeals are disposed in a median time of 114 days and an average time of approximately four months. Pet. Br. at 40. In the experience of *amici*, appeals which are not quickly dismissed for procedural default typically take far longer than this average. *See, e.g.*, *Steele v. Blackman*, 236 F.3d 130 (3d Cir. 2001) (appeal pending before the BIA for over twelve months); *Serrano*, 201 F. Supp. 2d 714 (N.D. Tex. 2002) (over seven months); *Roman v. Ashcroft*, 181 F. Supp. 2d 808 (N.D. Ohio 2002) (over nine months); *Yanez v. Holder*, 149 F. Supp. 2d 485 (N.D. Ill. 2001) (over sixteen months); *Mamedov v. Reno*, 00 Civ. 0442, 2000 U.S. Dist. LEXIS 10540 (S.D.N.Y. July 28, 2000) (at least seven months); *Chukwuezi*, 2000 WL 1372883, at *1 (at least seven months); *In re Small*, 23 I. & N. Dec. 448 (BIA 2002) (over eight months); *In re Olivares-Martinez*, 23 I. & N. Dec. 148 (BIA 2001) (over thirteen months); *In re Torres-Varela*, 23 I. & N. Dec. 78 (BIA 2001) (over fourteen months); *In re Bahta*, 22 I. & N. Dec. 1381 (BIA 2000) (over fifteen months); *In re Rodriguez-Ruiz*, 22 I. & N. Dec. 1378 (BIA 2000) (over ten months); *In re Devison-Charles*, 22 I. & N. Dec. 1362 (BIA 2000) (over eleven months); *In re Perez*, 22 I. & N. Dec. 1325 (BIA 2000) (over seven months); *In re Lopez-Meza*, 22 I. & N. Dec. 1188 (BIA 2000) (over thirteen months); *In re Puente*, 22 I. & N. Dec. 1006 (BIA 1999) (over ten months).

[29] *See, e.g.*, Lodging at L-17 (J.L. spent an additional five months in detention on an appeal INS later abandoned); Lodging at L-18 (INS appeal from termination of proceedings resulted in 160 days of additional detention for S.N. before INS defaulted by failing to file an appellate brief); Lodging at L-19 (After INS filed a notice of appeal from a cancellation grant, K.R. spent an additional ninety-seven days in detention before INS withdrew the appeal).

they properly fall within the statute. Pet. Br. at 26. This argument misapprehends the constitutional defect in mandatory detention, which is the lack of an individualized inquiry into the dangerousness and flight risk posed by a detainee. But even where the government's classification of a given detainee under § 1226(c) is in question, this mechanism does not provide a meaningful remedy to wrongful detention. To qualify for a bond, individuals must show that the government is substantially unlikely to prevail on the claim that they are removable under a category listed in § 1226(c). *See In re Joseph*, 22 I. & N. Dec. 799, 806 (BIA 1999). Immigration judges are bound to follow precedent decisions of the BIA, 8 C.F.R. § 3.1(g) (2002), even though the BIA revisits its own views on these classifications with some frequency, *see, e.g.*, *In re Yanez-Garcia*, 23 I. & N. Dec. 390 (BIA 2002) (reversing *In re K-V-D-*, 22 I. & N. Dec. 1163 (BIA 1999)). Making facial assessments on which arguments may prevail is difficult in this unsettled area of the law. Even the BIA appears to have difficulty in making these assessments.

- **Sengchanh Phengphonsavanah**, a citizen of Laos and a lawful resident since 1982, was arrested by INS shortly after completing a sentence for use of a vehicle without the owner's consent. He challenged the denial of bond, and on August 30, 2000, the immigration judge found him ineligible for release under § 1226(c) because he was charged as an aggravated felon. He appealed the determination and the BIA affirmed it *per curiam* on December 8, 2000, ninety-nine days later. However, when the BIA adjudicated the merits of Mr. Phengphonsavanah's case an additional five months later, it reversed itself, finding that his conviction did not, after all, constitute an aggravated felony. After more than a year in detention, Mr. Phengphonsavanah's proceedings were terminated.[30]

[30] Lodging at L-20.

Furthermore, appeals of custody status determinations may last as long as or even longer than the period of removal proceedings, and are widely regarded as futile for that reason. Joseph Okeke, whose case is discussed *supra* p. 17, was granted a hearing on the propriety of his mandatory detention on July 20, 1999, sixteen days after he was detained. The immigration judge determined that he was properly held under § 1226(c) notwithstanding his argument that his conviction, a first offense, did not meet the federal definition of a conviction for purposes of removability. His appeal of this determination was filed on July 26, 1999 and was still pending five months later, when he was granted cancellation of removal and released. *See* Lodging at L-6; *see also Thomas v. Reno*, No. 00-3493, slip op. (D.N.J. Oct. 11, 2001) (BIA decision on custody status rendered approximately six months after IJ determination); *In re Rojas*, 23 I. & N. Dec. 117 (BIA 2001) (decision rendered 215 days after IJ determination); *Joseph*, 22 I. & N. Dec. at 799 (decision rendered 106 days after IJ determination). Such hearings thus do not represent an adequate "safety valve," even on the limited issues they address.

More fundamentally, the hearing that is provided to those detained under § 1226(c) does not address the critical issue: whether an individual poses a flight risk or a danger to the community. In cases where those subject to detention under § 1226(c) have been granted bond hearings – either through federal court intervention or for other reasons – it becomes abundantly clear that many in fact represent little or no flight risk or danger.

° In March 2002, INS charged **Primitivo Molina** with removability as an alien convicted of two CIMTs based on two misdemeanor assault charges. The immigration judge did not consider the second crime to constitute a CIMT and set the minimum permitted bond of $1,500. INS did not appeal from this low bond, which Mr. Molina's family was able to post the same day. Several weeks later, when INS issued new charging papers asserting that the same conviction

was an aggravated felony, INS re-arrested Mr. Molina. The immigration judge denied bond pursuant to § 1226(c). No new facts concerning Mr. Molina's flight risk or dangerousness were adduced at the second custody hearing. The only thing that had changed was his re-classification as an aggravated felon for the same underlying conduct.[31]

Similarly, Mr. Van Eeten, whose case is discussed *supra* p. 10, was granted a bond of $5,000, when he was finally awarded an individualized bond hearing after a federal court found his mandatory detention unconstitutional. As noted, outside of detention, he successfully prosecuted his claim to citizenship. Lodging at L-4. Rayford Gill, a citizen of Belize and lawful resident since 1994, won a similar challenge and was granted a $5,000 bond. He has left detention and is currently pursuing his claim that he is not removable for his single offense of drug possession. *See Gill v. Ashcroft*, No. 01 C 9789, 2002 WL 1163729, at *1, *6 (N.D. Ill. May 31, 2002); Lodging at L-23.

CONCLUSION

Amici are firsthand witnesses to the tremendous costs exacted by § 1226(c). Our loved ones, community members, and clients suffer a complete deprivation of liberty under a system that refuses to see those detained as individuals.

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[31] Lodging at L-21. The arbitrariness of this classification, and its irrelevance to flight risk and danger, was brought into even sharper relief when Mr. Molina's sentence was subsequently vacated, rendering him no longer an aggravated felon. *See id.* Perhaps even more illogically, § 1226(c) prevents any possibility of release even for individuals who, if they abandoned claims to relief from removal, would clearly qualify for release under this Court's recent ruling in *Zadvydas v. Davis*, 533 U.S. 687 (2001). *See Chanthanounsy*, 2002 WL 1477170, at *1-2; Lodging at L-24 (Laotian national held for two years pending an administrative appeal although the INS would have been presumptively obliged to release him had he not appealed his deportation).

The burden of prolonged detention is inflicted on the basis of immigration charges that are frequently proved unsustainable or from which the law provides relief. Yet mandatory detention impedes their ability to answer the charges against them and forecloses any individualized consideration of risk of flight or dangerousness. *Amici* seek a ruling that these individuals be afforded the opportunity to demonstrate their fitness for release. For the foregoing reasons, the decision of the Court of Appeals should be affirmed.

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New York, NY

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APPENDIX
STATEMENTS OF INTEREST

Human Rights Advocates is an organization that provides education about the application of international human rights in both domestic and international fora. Its ultimate objective is to advance the cause of human rights so that basic protections are afforded to all individuals. Human Rights Advocates has appeared as *amicus* before a number of U.S. courts, including the United States Supreme Court, the Second, Fifth, Ninth, and Tenth Circuit Courts of Appeals, and the California Supreme Court. Human Rights Advocates has also appeared before a number of international fora, including the Inter-American Commission on Human Rights, the United Nations Commission on Human Rights, and the Sub-Commission on the Promotion and Protection of Human Rights.

Human Rights Watch is a non-profit organization established in 1978 that investigates and reports on violations of fundamental human rights in over 70 countries worldwide with the goal of securing the respect of these rights for all persons. It is the largest international human rights organization based in the United States. By exposing and calling attention to human rights abuses committed by state and non-state actors, Human Rights Watch seeks to bring international public opinion to bear upon offending governments and others and thus bring pressure on them to end abusive practices.

The **Extradition and Human Rights Committee of the American Branch of the International Law Association** ("Extradition Committee") is comprised of individuals from the academic, public and private sectors who have extensive experience in the field of international law and, specifically,

human rights law.[1] Members of the Extradition Committee have taught subjects such as international law, human rights law, and foreign relations law, and have written extensively in these fields. Furthermore, members of the Extradition Committee have participated in human rights litigation throughout the United States. The Extradition Committee has a longstanding interest in the development of international human rights law. It is committed to the international legal order, the rule of law, and the protection of fundamental human rights.

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[1] The Extradition and Human Rights Committee is one of a number of committees of the American Branch of the International Law Association. The views expressed herein represent only those of the Extradition and Human Rights Committee of the American Branch of the International Law Association. Not all members of the Committee participated in this project.